

Yong Nai Yung v Public Prosecutor

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COURT OF APPEAL (BRUNEI DARUSSALAM) — CRIMINAL APPEAL
NO 3 OF 2011
MORTIMER P, DAVIES AND ROGERS JJA
12 MAY 2011

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Criminal Procedure — Sentencing — Drug possession — Whether sentences manifestly excessive — Presumption of possession of cannabis for purpose of trafficking — Whether starting points taken by judge for deciding sentences led to manifestly excessive overall sentence — Whether offences arose out of same incident — Whether amount of drugs in both offences should be totalled to decide appropriate overall sentence — Guidelines for sentencing for offence of possession of cannabis for purpose of trafficking

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The appellant pleaded guilty in the Intermediate Court to four drug related charges and was given varying sentences of punishment as follows: First charge: four years and eight months jail and four strokes for possession of 91.802g cannabis on 4 January 2010; Second charge: nine years and four months jail and nine strokes for possession of 235.835g cannabis on 5 January 2010; Third charge: 12 months jail for consumption of cannabis on 4 January 2010; Fourth charge: six months jail for possession of an apparatus intended for consumption of cannabis on 4 January 2010. The sentences on the first and second charges were ordered to run consecutively and the sentences on the other two charges to run concurrently, resulting in a total sentence of 14 years jail and nine strokes. The appellant appealed to the Court of Appeal against sentence. According to the facts of the case, the cannabis and apparatus stated in the charges were recovered by Narcotic Control Bureau ('NCB') officers, first, from a car the appellant was driving on the night of 4 January 2010 when he was stopped by the officers and questioned, and thereafter, from his house. On the first and second charges, the appellant was presumed by s 15 of the Misuse of Drugs Act ('the Act') to have been in possession of cannabis for the purpose of trafficking in the drug ('the offence'). The Court of Appeal pointed out that before the Act was amended in 1992, possession of 300g cannabis triggered a minimum sentence of 20 years jail for the offence, but after the amendment, the amount was increased to 400g for the same minimum sentence. The amendment rendered the guidelines for sentencing for the offence laid down in 1986 by the then Chief Justice of Brunei no longer appropriate as it had a substantial effect when deciding the appropriate sentence to be imposed in cases where possession was between 300g and 400g and where it was less than 300g. The Court of Appeal proposed new guidelines for sentencing for the offence after trial: (i) between 300g and 400g — 14 to 20 years jail and between seven and ten strokes; (ii) between 200g and 300g — 10

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A to 14 years jail and between five and seven strokes; (iii) between 100g and 200g — five to ten years jail and either four or five strokes; and (iv) less than 100g — three to five years jail and either three or four strokes.

B **Held**, allowing the appeal against sentence and dismissing the appeal against sentence on the third and fourth charges:

C (1) A sentence of four years and four months jail and three strokes was substituted for the first offence. A sentence of seven years and four months jail and four strokes was substituted for the second offence. The sentences for the first and second offences were to be served as to one year and eight months, concurrently, and as to the remainder thereof, consecutively. The strokes imposed for them were to be wholly non-cumulative (see last para 18(d)).

D (2) Though the first and second offences were charged separately, they arose out of the same incident and, at the relevant time, the appellant had in his possession the total quantity of these two offences, viz 327.63g cannabis. In reaching the sentences that he did, the judge took starting points of seven years and 14 years respectively, i.e. a total starting point, for the overall criminality, of 21 years. That was manifestly excessive (see para 15).

E (3) If the sentences substituted for the first and second offences were served cumulatively, it would result in a total term of 11 years and eight months jail. As this would result in an overall sentence higher than that which would have been appropriate if the two offences had been charged as one, they should be served partly concurrently to result in an overall sentence of ten years which was appropriate in the circumstances of the case (see para 17).

G **[Bahasa Malaysia summary]**

H Perayu mengaku bersalah di Mahkamah Perantaraan ('Intermediate Court') terhadap empat pertuduhan berkaitan dadah dan dijatuhkan beberapa hukuman seperti berikut: Pertuduhan pertama: empat tahun dan lapan bulan penjara dan empat sebatan bagi milikan 91.802g kanabis pada 4 Januari 2010; I Pertuduhan kedua: sembilan tahun dan empat bulan penjara dan sembilan sebatan bagi milikan 235.835g kanabis pada 5 Januari 2010; Pertuduhan ketiga: 12 bulan penjara bagi penggunaan kanabis pada 4 Januari 2010; Pertuduhan keempat: enam bulan penjara bagi milikan apparatus yang diniatkan untuk penggunaan kanabis pada 4 Januari 2010. Hukuman bagi pertuduhan pertama dan kedua diperintahkan berjalan satu persatu dan hukuman bagi dua lagi pertuduhan berjalan serentak, membawa kepada jumlah hukuman 14 tahun penjara dan sembilan sebatan. Perayu merayu kepada Mahkamah Rayuan terhadap hukuman. Menurut fakta kes, kanabis dan apparatus yang dinyatakan di dalam pertuduhan ditemui oleh

pegawai-pegawai Biro Kawalan Narkotik ('BKN'), pertama, dari sebuah kereta yang dipandu perayu pada malam 4 Januari 2010 apabila dia diberhentikan oleh pegawai-pegawai tersebut dan disoal, dan kemudian, dari rumahnya. Berkenaan dengan pertuduhan pertama dan kedua, perayu dianggap di bawah s 15 Akta Penyalahgunaan Dadah ('Akta') sebagai mempunyai milikan kanabis bagi tujuan pengedaran dadah tersebut ('kesalahan tersebut'). Mahkamah Rayuan menyatakan bahawa sebelum Akta tersebut dipinda dalam tahun 1992, milikan 300g kanabis mencetuskan hukuman minima 20 tahun penjara bagi kesalahan tersebut, tetapi selepas pindaan, jumlah tersebut dinaikkan kepada 400g bagi hukuman minima yang sama. Pindaan tersebut menjadikan garis panduan bagi hukuman bagi kesalahan yang dinyatakan dalam tahun 1986 oleh Ketua Hakim Brunei pada ketika itu tidak lagi beraplikasi kerana ia mempunyai kesan substansial apabila memutuskan hukuman yang wajar yang dikenakan di dalam kes-kes di mana milikan adalah di antara 300g dan 400g dan di mana ia kurang daripada 300g. Mahkamah Rayuan mencadangkan garis panduan baru bagi hukuman terhadap kesalahan tersebut selepas perbicaraan: Di antara 300g dan 400g — 14 hingga 20 tahun penjara dan di antara tujuh dan sepuluh sebatan; (ii) di antara 200g dan 300g — sepuluh hingga 14 tahun penjara dan di antara lima dan tujuh sebatan; (iii) di antara 100g dan 200g — lima hingga sepuluh tahun penjara and sama ada empat atau lima sebatan; dan (iv) kurang dari 100g — tiga hingga lima tahun penjara dan sama ada tiga atau empat sebatan.

Diputuskan, membenarkan rayuan terhadap hukuman dan menolak rayuan terhadap hukuman atas pertuduhan ketiga dan keempat:

- (1) Hukuman empat tahun dan empat bulan penjara dan tiga sebatan digantikan bagi pertuduhan pertama. Hukuman tujuh tahun dan empat bulan penjara dan empat sebatan digantikan bagi pertuduhan kedua. Hukuman bagi kesalahan pertama dan kedua akan dijalani sebagai satu tahun dan lapan bulan, serentak, dan bagi bakinya, secara satu persatu. Sebatan yang dikenakan bagi mereka secara keseluruhannya tidak kumulatif (lihat perenggan 18(d)).
- (2) Walaupun kesalahan pertama dan kedua dituduh berasingan, ia timbul daripada insiden yang sama dan, pada masa material, perayu mempunyai di dalam milikannya jumlah keseluruhan kedua-dua kesalahan ini, iaitu 327.63g kanabis. Dalam mencapai hukuman tersebut, hakim mengambil sebagai permulaan masing-masing tujuh tahun dan 14 tahun iaitu jumlah poin permulaan, bagi jenayah keseluruhan, 21 tahun. Ia adalah amat berlebihan (lihat perenggan 15).
- (3) Jika penghakiman yang digantikan bagi kesalahan pertama dan kedua dijalankan secara kumulatif, ia akan membawa kepada tempoh sejumlah 11 tahun dan lapan bulan penjara. Oleh sebab ini akan mengakibatkan keseluruhan tempoh penjara yang lebih tinggi daripada yang sepatutnya

A wajar jika kedua-dua kesalahan dipertuduhkan sebagai satu, ia patut berjalan serentak sebahagiannya untuk membentuk hukuman keseluruhan sepuluh tahun yang wajar di dalam keadaan kes tersebut (lihat perenggan 17).]

B **Notes**

For cases on drug possession, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4542–4543.

Cases referred to

C *M S bin HI v Public Prosecutor* Criminal Appeal No 7 of 2005 (refd)

Legislation referred to

Misuse of Drugs Act 1978 s 15, Second Schedule

D *Appellant in person.*

Dk Hj Hana Molina bt Pg Hj Mohammad (Deputy Public Prosecutor) for the public prosecutor/respondent.

Davies JA:

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[1] On 8 March 2011 Yong Nai Yung, the appellant, pleaded guilty in the Intermediate Court to the following charges:

- F (a) on 4 January 2010 of having in his possession 91.802g of a class B controlled drug, namely cannabis;
- (b) on 5 January 2010 of having in his possession 235.835g of a class B controlled drug namely cannabis;
- G (c) on 4 January 2010 of consumption of a class B controlled drug namely cannabis; and
- (d) on 4 January 2010 of having in his possession apparatus intended for the consumption of cannabis.

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[2] The court imposed the following sentences:

- (a) four years and eight months imprisonment and four strokes;
- (b) nine years and four months imprisonment and nine strokes;
- I (c) 12 months imprisonment; and
- (d) six months imprisonment.

[3] The learned judge ordered that the sentences on the first and second

charges be served consecutively and that the sentences on the other charges be served concurrently. This resulted in a total sentence of 14 years imprisonment and nine strokes. A

[4] The appellant has appealed against those sentences. Effectively his appeal is against the first two sentences only and that they have been ordered to be served consecutively. B

[5] On both the first and second offences the appellant was presumed by s 15 of the Misuse of Drugs Act to have been in possession of cannabis for the purpose of trafficking therein. That presumption arises when a person is proved or presumed to have in his possession more than 15g of cannabis. By the Second Schedule to the Act the minimum sentence for that offence is three years imprisonment and three strokes. C

[6] Also by the Second Schedule to the Act, possession for the purpose of trafficking of less than 400g of cannabis carries a maximum sentence of 20 years and ten strokes. Possession of not less than 400g and not more than 600g brings a maximum sentence of 30 years and 15 strokes and a minimum sentence of 20 years and 15 strokes. Where the amount is more than 600g the punishment is death. This has been the position since 1992. D E

[7] In 1986 the then Chief Justice of Brunei laid down some guidelines for the guidance of courts in Brunei in sentencing persons convicted of possession of cannabis for the purpose of trafficking therein. At that time relevant minimum and maximum sentences imposed by the Second Schedule were: F

- (a) where the amount did not exceed 300g, a minimum of three years imprisonment and three strokes and a maximum of 20 years imprisonment and ten strokes; and G
- (b) where the amount exceeded 300g the minimum sentence was 20 years imprisonment and 15 strokes.

[8] From this it can be seen that the amendment made in 1992 involved increasing the amount at which the minimum sentence of 20 years commences from 300g to 400g. This had a substantial consequent effect, not only on the minimum sentence to be imposed on those in possession of quantities of cannabis of between 300 and 400g, and consequently the appropriate sentence within that range; but also on the appropriate sentences to be imposed on those found to be in possession of cannabis in quantities of less than 300g. H I

[9] This is a substantial change. It makes the guidelines proposed by the former Chief Justice no longer appropriate.

A [10] We should add that, had those guidelines remained appropriate, it would have been difficult to interfere with the sentences appealed against for the learned sentencing judge appeared to follow those guidelines. But in view of this substantial change in the legislative sentencing scheme, we think it appropriate to set new guidelines.

B [11] With those substantial changes in mind, we propose the following guidelines for a sentence to be imposed for this offence after trial:

- C (a) between 300 and 400g — from 14 to 20 years imprisonment and between seven and ten strokes;
- (b) between 200 and 300g — from ten to 14 years imprisonment and between five and seven strokes;
- D (c) between 100 and 200g — from five to ten years imprisonment and either four or five strokes; and
- (d) less than 100g — between three and five years imprisonment and either three or four strokes.

E [12] Having set out guidelines we think it important to repeat what this court said in *M S bin HI v Public Prosecutor* Criminal Appeal No 7 of 2005:

F Guidelines are to improve the uniformity of sentences for similar offences. This enhances justice between defendants. Also, they are intended to ease the burden on judges. They are not mandatory sentences but as guidelines they must be followed. Similar offences vary in their gravity as do the mitigating features, therefore judges may and often must depart from them. However, when they do so it is incumbent upon them to start with the guidelines and then give reasons for departing from them, whether they are passing a higher or lower sentence.

G [13] We should add that we invited the public prosecutor to suggest guidelines and the prosecutor did so. Those guidelines were much more restrictive than those which we have suggested and, like those proposed by the former Chief Justice, followed a rigid mathematical formula in which, with each increase of 20g the sentence increased by one year. We think that

H guidelines such as these impose too much restriction upon sentencing discretion to be exercised in each case.

I [14] In the present case the learned sentencing judge found the relevant facts as follows:

2 On 4 January 2010 at about 2128 hours, in the vicinity of Yih Fa Trading & Printing Co in Kg Kiulap, Brunei Darussalam, the Narcotic Control Bureau (NCB) stopped a black KIA Shuman car which was driven by the defendant. His girlfriend was a passenger in the car. The defendant was asked if he wanted to hand over

anything relating to drugs. He showed the officers a black canvas zip-type waist pouch labeled 'UVEX Safety' which was located near the car's handbrake. The pouch was labeled 'E1' and it contains the following items:

- (a) some clear plastic packets containing dried plant material inside a white/blue 'L & M' cigarette box;
- (b) *some clear plastic packets containing dried plant material wrapped with a piece of newspaper tapped with adhesive tapes;*
- (c) one piece of white writing pad used to wrap some dried plant material;
- (d) one pair of scissors, and
- (e) *one piece of metal funnel.*

When he was asked further if he wanted to hand over anything else relating to drugs, the defendant showed the officers 'E2': a navy blue woolen arm sleeve labeled 'YAMAHA' which was found inside the side pocket of the car door next to the driver seat. 'E2' contained a clear plastic bottle believed to be used to consume controlled drug.

A body search was conducted on the defendant but nothing relating to drugs was found on him. Again, the defendant was asked if he wanted to hand over anything relating to drugs. He then told the officers that he had thrown out of the car a yellow plastic carrier bag which contained drugs. Subsequently, the officers found a plastic bag which fitted his description outside the car on the passenger side. This yellow 'Soon Lee Megamart' carrier bag was labeled 'E4'.

Inside 'E4' was two pieces of Chinese newspaper. Each piece of newspaper was tapped with yellow adhesive tape and each was used to wrap a clear plastic packet which contained dried plant material. 'E1', 'E2', 'E3' and 'E4' were seized.

The car was searched but nothing relating to drugs was found. After the search, the NCB officers drove the defendant's car to his house at No 10, Simpang 287-4, Kg. Subok, Brunei Darussalam. The defendant and his girlfriend were escorted there.

At his house, the defendant showed the NCB officers, a locked wardrobe which he unlocked. He then showed the officers a red metal container labeled 'De Sheng'. This was labeled 'E5'.

Inside 'E5' was a white plastic carrier bag labeled 'Boulevard Hypermarket & Department Sdn Bhd' which had a yellow plastic carrier bag labeled 'Jaya Supermarket'. Inside the yellow plastic carrier bag were two packages wrapped with Chinese newspaper and labeled '1' and '2'. Inside the packages were two clear plastic packets containing dried plant material.

On being asked further if he wanted to hand over anything relating to drugs, the defendant showed the officers a box labeled Camry-Electronic Pocket Scale ('E6') and a lime green shoe box labeled 'Giogio' ('E7').

Inside 'E6' was a digital balance in a black pouch while 'E7' was a Chinese newspaper package tapped with brown adhesive tape. Inside the package were

- A three clear plastic packets containing dried plant material. All these items were seized. The defendant's house was then searched but nothing relating to drugs was found.
- B The defendant admitted that he consumed cannabis prior to his arrest, that the drugs found in his possession were for sale. The utensils found in his possession belonged to him.
- C The urine sample of the defendant was analysed and found to be positive for cannabis.
- On 6 January 2010, the drug related exhibits were sent to the Department of Scientific Services for analysis.
- Upon analysis, the dried plant material found in 'E1' and 'E4' were found to contain a total of 91.802 grams of cannabis. The dried plant material found in 'E5' and 'E7' were found to contain a total of 235.835g of cannabis.
- D The metal funnel ('E1(e)') and 'E2' were found to contain traces of cannabis.
- The defendant has no previous drug convictions but he has a previous conviction for theft under s 379 of the Penal Code in 1987 for which he was bound over for good behaviour for two years in the sum of B\$1,000 with one surety.
- E [15] It is of some significance, we think, that though the first and second offences were charged separately they arose out of the same incident and that, at the relevant time, the appellant had in his possession the total quantity of these two offences, namely 327.63g of cannabis. This should be borne in mind
- F when considering the appropriateness of the overall sentence. In reaching sentences of four years and eight months and nine years and four months respectively for these offences, the learned sentencing judge took starting points of seven years and 14 years respectively, that is a total starting point for the overall criminality of 21 years. We think that that was manifestly excessive.
- G When regard is had to the guidelines we think that the overall sentence after trial would be between 15 and 16 years imprisonment.
- [16] In this case, having regard to the appellant's absence of previous convictions we think that that should be 15 years.
- H [17] Applying the above guidelines to the facts of this case, if the first and second offences are viewed separately, we would take, as a starting point for the first offence, a term of six years and six months imprisonment reducing it to four years and four months imprisonment for the plea of guilty. And we would
- I take, as a starting point for the second offence, a term of 11 years imprisonment reducing it to seven years and four months imprisonment for the guilty plea. If these were ordered to be served wholly cumulatively it would result in a total term of 11 years and eight months imprisonment. However, because this would result in an overall sentence higher than that which would have been

appropriate if the two offences of possession had been charged as one, we think that they should be ordered to be served partly concurrently so as to result in an overall sentence of about ten years which we think is appropriate in the circumstances of this case.

[18] Accordingly we make the following orders:

- (a) allow the appeal against sentence;
- (b) set aside the sentence imposed below for the first offence and substitute for that sentence a sentence of four years and four months imprisonment and three strokes;
- (c) set aside the sentence imposed for the second offence and substitute for that sentence a sentence of seven years and four months imprisonment and four strokes;
- (d) order that the sentences for the first and second offences be served, as to one year and eight months, concurrently and, as to the remainder thereof, consecutively but that the strokes imposed for them be wholly non cumulative; and
- (e) dismiss the appeal against the sentences imposed for the third and fourth offences and the order that they be served concurrently with those for the first and second offences.

[19] The effect of this appeal is the imposition of a total sentence of ten years imprisonment and four strokes.

Appeal against sentence allowed and appeal against sentence on third and fourth charges dismissed.

Reported by Ashok Kumar